IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5656/2013

In the matter between:

DR SAMUEL ELLIS LEWIS Applicant

and

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING Respondent

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JUDGMENT : DELIVERED ON 28 MAY 2015

MANCA AJ:

1. The applicant commenced action proceedings, as plaintiff, against the respondent, as defendant, in April 2013. As much of this judgment will refer to allegations contained in the pleadings in the action, I will refer to the parties as the plaintiff and the defendant.

2. In his original particulars of claim, the plaintiff alleged that at all material times he was the owner of the property known as Portion 2 of Erf 182/4 Hoogekraal, District George ("the property") and that he had concluded an oral agreement of lease with KG Timbers CC ("KG Timbers"), in terms whereof he let the property to KG Timbers for the purpose of sawdust

milling at a monthly rental of R35 000 per month.

3. He alleged that on 15 October 2009 the defendant had served him with an unlawful notice in terms of s 31(1) of the National Environmental Management Act 107 of 1988, in terms whereof he was ordered to, *inter alia*, cease all decommissioning of timbers on the property; appoint an environmental assessment practitioner to compile a report and to submit a report and rehabilitation plan for approval by the defendant.

4. The plaintiff alleged that, consequent upon service of the notice, KG Timbers vacated the property and no longer paid him rental. He sought to hold the defendant liable for the loss of that rental. The plaintiff also alleged that, as a consequence of KG Timbers vacating the property, he was unable to sell 33 000 metric tons of compost at a profit of 50 cents a kilogram, and as a result he incurred a further loss in the amount of R15 million.

5. On 27 May 2013 the defendant entered an appearance to defend. The plaintiff thereafter delivered various notices of his intention to amend his particulars of claim. In August 2013 he delivered a set of amended particulars.

6. In the amended particulars the plaintiff made specific reference to a meeting which took place on 19 August 2010, at which meeting, so it was alleged by the plaintiff, he was told by representatives of the defendant

what action was required of him to remedy the environmental issue that had arisen at the property. He alleged that he furnished his rehabilitation plan in accordance with the defendant's advices by 7 September 2010, but that on or about 8 February 2011 the defendant rejected his rehabilitation proposal and kept in force the compliance notice. He did not allege that any agreement was concluded at this meeting.

7. He also alleged that when the compliance notice was served the defendant was aware that the property was bonded and that he derived an income therefrom from KG Timbers, which income was used to make the bond repayments.

8. He went on to allege that, as a result of the defendant's conduct, he received no further rental income, was unable to pay the bond instalments, fell into arrears with his payments and, as a consequence, the property was sold in execution by the bondholder for R151 000. According to him, this was way below the market value of the property and he claimed damages in the sum of just over R4 million, being the difference between the market value of the property and that for which it was sold in execution. He continued to claim loss of rental for 32 months, from June 2010 to January 2013, and his loss of profit in respect of the compost in the sum of R15 million. For the sake of completeness I should add that the unlawful act upon which he relied as the cause of his woes, remained the unlawful notice which had been served on him.

9. On 6 September 2013 the defendant delivered a notice in terms of Rule 23(1) of the High Court Rules, in which notice the defendant alleged that the amended particulars of claim failed to disclose a cause of action, alternatively were vague and embarrassing. In so far as the defendant alleged that the particulars were vague and embarrassing, the plaintiff was afforded an opportunity of removing the causes of complaint.

10. In the Rule 23(1) notice the defendant alleged, *inter alia*, that before the plaintiff could institute legal proceedings against the defendant, it was obliged to give the defendant notice of the intended action, pursuant to the provisions of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002 ("the ILP Act").

11. The defendant alleged that no allegations of fact were made in the particulars of claim to the effect that the plaintiff had complied with the provisions of s 3 of the ILP Act, which required that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the organ of state was given the requisite notice.

12. The defendant also alleged in the Rule 23(1) notice that no cause of action had been made in delict; that no allegations of fact were made to sustain the conclusion that the defendant was liable to the plaintiff in respect of his alleged economic loss and that the defendant's conduct was not actionable.

13. The plaintiff did not respond to the Rule 23(1) notice and on 8 October 2013 the defendant delivered an exception to the plaintiff's particulars of claim, which exception mirrored the grounds set out in the Rule 23(1) notice.

14. This application was launched on 18 December 2013.

15. In this application the plaintiff seeks an order "*condoning the late filing of the applicant's notice in terms of the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002*".

16. In the founding affirmation deposed to by the plaintiff, he referred to the exception which had been taken to the particulars of claim and stated that when the particulars of claim were drafted, his legal representatives omitted to send a notice as contemplated by s 3 as read with s 4 of the ILP Act.

17. He alleged that "*this was purely an oversight and was occasioned as a result of the focus being on a perusal of the documentation relevant to the matter. Trying to understand it and considering that the Department of Environmental Affairs and Development Planning is an organ of state and accordingly it was necessary to give the requisite six months' notice. In the rush to settle the particulars of claim, this aspect was overlooked*". Just what the rush was to settle the particulars of claim was not explained, although it may have been that prescription of the plaintiff's claim was

looming large.

18. The plaintiff also alleged that on 24 October 2013 his attorney addressed a letter in terms of the ILP Act to the defendant. He annexed a copy of that letter to his affirmation.

19. In that letter his attorney made specific reference to the unlawful notice as the basis for the plaintiff's claim against the defendant and, in his founding affirmation, the plaintiff expressly stated that his cause of action was set out in that letter.

20. I should add that, in the founding affirmation, the plaintiff made no allegation that he enjoyed prospects of success in the action. He did aver that should the Court which was to hear the exception find that the exception was bad and that he had a good cause of action, this was a factor which would weigh heavily in favour of condonation being granted. By implication, he appeared to accept that if the exception was good, this would be a factor which would weigh heavily against condonation being granted.

21. No confirmatory affidavit was deposed to by his attorney.

22. The defendant's answering affidavit was delivered on 15 April 2014. The application was opposed and the defendant took issue with the plaintiff on all material issues, including but not limited to whether the plaintiff had

adequately explained his default and whether he enjoyed any prospects of success in the action. The answering affidavit could have left the plaintiff with no doubt that the defendant denied that the plaintiff had good cause for his failure to comply with the ILP Act.

23. After the answering affidavit was delivered, and in August 2014, the plaintiff again sought to amend his particulars of claim. In that amendment, which was opposed, but in respect of which leave to amend was granted on 20 February 2015, the plaintiff no longer alleged that the notice was unlawful but alleged that the notice effectively precluded him from generating any income from the property. In other words, he no longer relied on the unlawful notice as the basis for his cause of action.

24. He now alleged that in August 2010 and at the meeting held with representatives of the defendant (and to which he had referred in a previous iteration of his claim),[1] a procedure was agreed to in terms of which he would prepare a rehabilitation plan for consideration by the defendant. He alleged that, as a consequence of that agreement, and the Constitution of the Republic, the defendant owed him a duty of care to consider his plan timeously; to follow a fair procedure when considering that plan; to act without negligence; to schedule meetings and to expedite the finalisation of the matter.

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[1] See paragraph 6 above.

25. The plaintiff went on to allege that, in breach of that duty, the defendant failed to consider, review and adopt the plan before September 2010. I pause to mention that the plaintiff did not allege that the defendant was under a duty to adopt the plan at all, let alone before September 2010. He also alleged that meetings were not scheduled, that the defendant took no steps to consider the plan, and that the defendant only considered and reviewed the plan in February 2011 when the defendant rejected the plan.

26. As a result of that conduct, the plaintiff alleged that KG Timbers vacated the property in June 2010 and paid him no further rental, he was unable to generate income, he could not make bond payments and the property was sold in execution. He accordingly claimed damages of loss of rental from September 2010, loss of profit from his inability to sell compost and the difference in the market value of the property and what it realised in a sale in execution.

27. The plaintiff did not deliver a replying affirmation to the defendant's answering affidavit.

28. On 8 May 2015, however, the plaintiff delivered a supplementary founding affirmation. In that affirmation he stated that he had been advised by counsel that his original application for condonation was lacking in detail and did not address all the relevant issues. Counsel also apparently advised him that the most relevant document was a letter which had been addressed by his attorneys to the defendant on 16 August 2012 and which

had not been included in his founding affirmation. This letter was annexed to his supplementary founding affirmation.

29. It was and is a letter which was written by his attorney to the defendant on 16 August 2012, in which letter his attorney complained that the defendant's ongoing conduct in the matter, which he characterised as obstructive, "*is responsible and grossly negligent*" and alleged that, as a consequence, the plaintiff had suffered damages in the amount of R14.7 million made up by, *inter alia*, a loss of rental and other issues which were set out in a schedule with which the Court has not been favoured. The plaintiff demanded payment of the R14.7 million in the letter.

30. Specific reference was made in the letter to the plaintiff's bondholder being in the process of selling the property in execution and that it was inevitable that the property would be sold at a fraction of its value. The letter advised the defendant that the plaintiff would hold the defendant liable for such loss once those damages had been quantified.

31. Although counsel is said to have advised the plaintiff that his original application for condonation was lacking in detail, counsel apparently failed to advise the plaintiff that one of the aspects in which his application lacked detail was the failure to allege that he enjoyed some prospects of success in the action. No allegations are made in this regard in the supplementary affirmation.

32. What one does find in the supplementary affirmation is an allegation that the plaintiff has suffered damages as a result of the respondent's conduct, as set out in the amended particulars of claim.

33. No attempt was made to explain why he now accepted that the notice was lawful and that he now based his cause of action on the breach of a procedural agreement he had reached with the defendant in September 2013. What he did allege, in this affirmation, was that his damages only manifested themselves during February 2012 when the sale in execution took place. (It turns out that this date was incorrect and that the sale in execution only took place on 31 October 2012. This was corrected by way of a further supplementary founding affirmation handed up at the commencement of the hearing.) This allegation was made in order for him to allege, as he did, that the debt owed by the defendant to him only became due during February 2012.

34. There can be no doubt that this allegation was made by the plaintiff in order to allege, as he did, that the August letter constituted compliance with the ILP Act.

35. In summary, the main purpose of the supplementary founding affirmation was for the plaintiff to allege that his claim against the defendant only became due in February 2012 and that this attorneys gave the defendant notice of his claim in August 2012. The consequence thereof, so he submitted in his supplementary affirmation, was that there had been

compliance with the ILP Act.

36. Once again, there was no confirmatory affidavit from his attorney.

37. A supplementary answering affidavit to the supplementary founding affirmation was deposed to by the defendant. The gist of that affidavit remained that the plaintiff had not made out a case for condonation.

38. On 12 May 2015 the defendant again delivered a notice in terms of Rule 23(1) in which it alleged that the newly amended particulars of claim still did not disclose a cause of action, alternatively were vague or embarrassing.

39. Amongst other things, the Rule 23(1) notice alleged that the particulars failed to sustain a cause of action on the basis that the facts alleged by the plaintiff failed to disclose any causal link between the alleged negligence of the defendant and the suggested prejudice of the plaintiff; that certain of the damages sustained by the plaintiff accrued prior to the act upon which the plaintiff relies for the causing of such damages; and that the particulars fail to disclose a cause of action upon which the plaintiff alleges that the defendant's conduct was wrongful and negligent.

40. No notice of intention to amend the particulars of claim consequent upon this Rule 23(1) notice has been delivered.

41. Prior to the hearing of this matter on Tuesday, 26 May 2015, the plaintiff

and the defendant delivered heads of argument.

42. The defendant's heads of argument were terse, to say the least.

43. In those heads of argument it was contended that the 16 August 2012 letter complied with the provisions of s 3(2) of the ILP Act on the basis that it was sent within six months of February 2012, being the date on which the debt became due. If that were the case, there would have been no necessity for the plaintiff to seek condonation for non-compliance with the ILP Act and this application would have been rendered redundant.

44. However, at the commencement of the hearing, Mr Whitaker, who appeared for the defendant but who did not draft the plaintiff's heads of argument, disavowed that submission contained in the plaintiff's heads of argument and proceeded to argue the matter on the basis that there had not been compliance with the ILP Act and, as a consequence, persisted with the plaintiff's application for condonation.

45. S 3(4) of the ILP Act provides as follows:

> "*(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.*
>
> *(b) The court may grant an application referred to in paragraph (a) if it is satisfied that -*
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> *(i) the debt has not been extinguished by prescription;*

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure."

46. In this matter, the issue of prescription does not arise on the case as presently pleaded by the plaintiff. No more needs to be said on that account.

47. The two issues which do arise are whether the plaintiff has established good cause for his failure to give the required notice and whether the plaintiff has established that the defendant was not unreasonably prejudiced by his failure to give such notice.

48. It is now settled law that the "*good cause*" requirement contained in the ILP Act will be met by an applicant who not only has furnished an explanation of his default sufficiently fully in order for the Court to understand how it came about and thereby to assess his conduct and motives, but also by an applicant who is able to show some prospects of success on the merits of his case.[2] In *Rance* the SCA pointed out that an applicant acts at his own peril when a Court is left in the dark on the merits of an intended action.

49. *In casu*, it was argued by Mr Whitaker that the failure to give the requisite notice could not be laid at the plaintiff's door and was occasioned solely as

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[2] See *Madinda v Minister of Safety & Security* [2008] 3 All SA 143 (SCA) and *Minister of*

a result of an oversight on the part of his attorney.

50. It is correct that in the founding affirmation the plaintiff admitted that he had failed to give the requisite notice and alleged that such failure was due to an oversight on the part of his attorney. He averred that notice was only given in October 2013 after receipt of the defendant's first Rule 23(1) notice.

51. However, in the supplementary affirmation, the plaintiff painted a vastly different picture.

52. In the supplementary founding affirmation the plaintiff alleged, as I have indicated, that his damages only manifested themselves in February 2012 when the property was sold in execution. He then alleged that the August 2012 letter was written by his attorney. As this was within the six months from the date on which he now alleged the debt became due, he alleged that there had been compliance with the ILP Act. In fact, he alleged that it was only after the property was sold in execution that he realised that he had no alternative but to seek compensation from the defendant and, pursuant thereto, he instructed his attorneys to institute legal proceedings against the defendant. He alleged that his attorneys then instructed counsel to prepare the necessary documents and he trusted that all the prerequisites would be complied with. He accordingly alleged that,

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Agriculture and Land Affairs v C J Rance (Pty) Ltd [2010] 3 All SA 537 (SCA).

pursuant to those instructions, the August letter was written and, in the absence of a response, summons was issued.

53. This explanation is fraught with difficulty.

54. Firstly, he affirmed positively that his damages only manifested themselves on the sale in execution of the property on 12 February 2012 and that, as a consequence thereof, he sought advice on his damages claim. This is demonstrably untrue. The property was only sold in execution in October 2012. The error is not immaterial. It permeates everything that follows.

55. The allegation that the property was sold in execution in February 2012 and that this was the catalyst for his claim for damages was made in order to demonstrate that his claim only became due in February 2012 and that his attorney's letter of August 2012 thus constituted notice, as required by the ILP Act. He also states clearly in his affirmation that it was only after the sale in execution that he sought advice in respect of a claim against the defendant and that it was after he sought such advice that the August 2012 letter was written. If all of this was correct, then non-compliance with the ILP Act would not arise. For good measure, these allegations, if they bore scrutiny, would also absolve his attorneys from any blame.

56. But of course, as a fact, the property was not sold in execution in February 2012 but only in October 2012. It follows, as night follows day, that he did

not only realise that he had a damages claim against the defendant when the property was sold in execution and only then seek legal advice on a potential claim, because the August letter written by his attorney pre-dated the sale in execution by some months. In fact the letter itself refers to claims which had arisen prior to February 2012 and to a possible claim that may arise once the property has been sold in execution.

57. Whilst Mr Whitaker sought to disavow any reliance on the allegations relating to the August letter, the difficulty which he and the plaintiff face is that the plaintiff has affirmed two mutually irreconcilable versions.

58. On the first version, he admits that there was non-compliance with the ILP Act and seeks to apportion blame for that non-compliance on his attorney.

59. On the second version, and in an effort to avoid having to apply for condonation, he avers that there was in fact compliance with the ILP Act and therefore no oversight on the part of his attorney.

60. In order for the Court to be satisfied that he has an adequate explanation for his default, the plaintiff must fully explain the default in order for the Court to understand his motives and conduct. It goes without saying that the explanation must be an honest one.

61. In this case I am faced with contradictory factual versions, one of which is demonstrably untrue and which was advanced with the sole purpose of

avoiding the consequence of failing to comply with the ILP Act. The other explanation simply alleges that no notice was given and that this was due to an oversight on the part of his attorney.

62. The fact that the plaintiff was willing to affirm a demonstrably false version of events in order to escape the consequences of his failure to comply with the ILP Act causes me to have grave doubts about the factual version which he now wishes the Court to accept. Put bluntly, having lied in the supplementary affirmation, with the specific purpose of avoiding the consequences of not having given notice, causes me to doubt the veracity of that contained in the founding affirmation. This doubt is exacerbated by the fact that his attorney has not deposed to an affidavit explaining what happened.

63. I am accordingly not satisfied that the plaintiff has adequately explained the reason for his failure to give the required notice.

64. That, however, is not necessarily the end of the matter, as both *Rance* and *Madinda* have indicated that good prospects of success on the merits may compensate for a poor explanation in respect of the failure to give the requisite notice.

65. Unfortunately for the plaintiff, he also fails miserably on this count. Indeed, Mr Whitake conceded that the exception to the amended particulars of claim was good.

66. Mr Whitaker, however, urged me to bear in mind that the plaintiff may be able to amend his particulars of claim to avoid the consequences of the exception. The difficulty with that proposition is that no amendment was placed before me and I am not able to gaze into a crystal ball and divine what amendments, if any, the plaintiff may make to render his claim inexcipiable. I must decide the matter on the case as presently pleaded and, as presently pleaded, the case is bad. But even if I were able to speculate on what amendments, if any, the plaintiff was able to make, I will still be in the dark as to whether those as yet unknown allegations will not only contain a sustainable cause of action but will enjoy some prospects of being established at a trial. Apart from simply referring to allegations in his various particulars of claim, the plaintiff has chosen not to disclose any of the evidence available to him which could indicate that he enjoys some prospects of success at a trial. In my view, the plaintiff has not established any prospects of success in the action.

67. In the circumstances I am satisfied that the plaintiff has not established that good cause exists for his failure to have complied with the ILP Act. In the circumstances it is not necessary for me to consider whether or not the defendant has been unreasonably prejudiced by the failure to give the notice.

68. I accordingly make the following order:

(1) The application is dismissed with costs, such costs to include the

costs of two counsel.

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MANCA AJ

Acting Judge of the High Court